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Utah Supreme Court

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Sumner J. Hatch; Attorneys for Defendants and Respondents;

Recommended Citation

Brief of Respondent, *Givan v. Lambeth*, No. 8955 (Utah Supreme Court, 1958).
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FEB 16 1959

IN THE SUPREME COURT

of the

STATE OF UTAH

EDWIN B. GIVAN,

Plaintiff and Appellant,

—vs.—

FRANK LAMBETH, sometimes known as
 FRANK R. LAMBETH, an unmarried man;
 NORMAN W. ESMEIER and CORRINE L.
 ESMEIER, his wife; T. THALLO LAMBETH
 and MRS. T. THALLO LAMBETH, his wife;
 KEITH B. LAMBETH and MRS. KEITH B.
 LAMBETH, his wife; ELLIS B. LAMBETH
 and MRS. ELLIS B. LAMBETH, his wife;
 AUBRA B. LAMBETH and MRS. AUBRA B.
 LAMBETH, his wife; RAMONA S. WOOL-
 SEY, and LA RAE B. LAMBETH,

Defendants and Respondents.

BERTRAND T. GIVAN, INA GIVAN and
 HELEN GIVAN,

Third Party Plaintiffs,

—vs.—

FRANK LAMBETH, sometimes known as
 FRANK R. LAMBETH, an unmarried man;
 and NORMAN W. ESMEIER,

Third Party Defendants.

BRIEF OF RESPONDENTS

SUMNER J. HATCH

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 Respondents*

409 Boston Building
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FILED

DEC 24 1958

Supreme Court, Utah

No. 8955

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No. 8955

BRIEF OF RESPONDENTS

NATURE OF THE CASE

The defendants have little quarrel with plaintiffs' statement of the nature of the case, agreeing with that

statement except for the feeling that it must be set forth that both by the law and the instructions of the court the findings of the jury in the case were advisory only.

STATEMENT OF FACTS

The statement of facts made by the plaintiff is also fair as far as it goes, with the exception of several instances we feel to be in error, these portions will be pointed out in this statement of facts augmenting that of the plaintiff.

With regard to the corrections:

1. On page 7, line 16, of plaintiff's brief, it indicates that Pacific Finance Company on June 19, 1953 had taken a judgment against Givans, Inc., for approximately \$10,000.00, referring to Exhibit 16. Exhibit 16 as part of the record shows that the \$10,000.00 judgment was entered by Farmers State Bank on September 25, 1953. Further, this judgment arose from the residue of the obligation to Farmers State Bank in the sum of \$12,000.00 which was contained in the obligations of Givans, Inc., and set forth in the agreement at the time defendants purchased the corporate stock.

2. With regard to manual delivery of the deeds, Keith Lambeth places the time in July, 1952 (T. 415).

3. The \$13,700.00 mortgage to Pacific Finance was given for consideration which would increase the assets of Givans, Inc. equally with the increase in the liabilities (plaintiff's brief, page 9).

4. The mortgage given to L. C. Miles on July 1, 1953, was a renewal of a debt set forth in the stock sale agreement of January 6, 1953.

5. Each of the Exhibits 7, 8, and 9 (the three deeds), and Exhibit 10 (the bill of sale) were executed by Frank Lambeth on August 1, 1950, and were manually delivered to Keith Lambeth in the summer of 1952.

FURTHER STATEMENT OF FACTS BY DEFENDANTS

The youngest of the Lambeth boys, Aubra, attained his majority in 1942 (T. 180). All of the boys worked for the sheep operation from 1934 to and including 1952 and never drew full wages (T. 401-502).

With regard to the solvency of Frank Lambeth at the time of executing the bill of sale and deeds in August, 1950, Frank had no obligations not secured by property. At the time of the delivery of the deeds in the summer of 1952, he had no obligations not secured by property. On May 18, 1953, when the deeds and bill of sale were recorded, Frank Lambeth was indebted jointly and severally with Norman Esmeier to the Givan brothers for the four notes set forth in plaintiff's complaint, two being payable at \$72.61 per month and two being payable November 30, 1953, with a sixty-day grace period. These notes were secured by recourse to all the corporate stock held by Lambeth and Esmeier consisting of 1980 of the 2,000 shares issued (addendum Exhibit 28).

The court held in its findings of fact on the first part of the trial that the defendants took over the busi-

ness and its assets rather than the stock (R. 60). The court further found that the assets of the corporation on February 18, 1953, were in excess of \$100,000.00 (R. 58). Concerning the value of the assets of Givans, Inc. in February, 1953, Bertrand Givan testified that the building was worth \$70,000.00, the ground \$20,000.00 to \$25,000.00, used cars \$10,000.00, tools and equipment \$15,000.00 to \$18,000.00, and stock between \$15,000.00 and \$20,000.00 (T. 107-108), or a total value computed from his lowest figure of \$130,000.00, besides notes and accounts receivable in the sum of \$13,000.00 to \$14,000.00 (T. 108).

Edwin Givan testified that in February, 1953, the garage building was worth \$70,000.00, the ground \$20,000.00 (T. 137), parts \$14,000.00 to \$18,000.00, equipment and tools \$15,000.00, oil and grease \$1,000.00 to \$1,500.00 (T. 138), used cars \$10,000.00, furniture and fixtures \$5,000.00, and accounts and notes receivable \$8,000.00 to \$10,000.00, or a total at his lowest figures of \$143,000.00 worth of assets (T. 139). The liabilities at this time were set forth in the agreements between the parties and totaled \$57,850.00.

There is no showing of an increase or decrease in the assets of the corporation between the date of sale and the date of recording the deeds and bill of sale, Exhibits 6, 7, 8, 9, and 10, with the exception of a \$13,700.00 mortgage to Pacific Finance on May 12, 1953 (Exhibit 13), which was for value received and would make no difference in the solvency of the corporation as it shows an equal increase in assets and liabilities.

Frank Lambeth has a monthly income for life independent of the sheep business and the garage business in the sum of \$146.00 per month (T. 307-308).

STATEMENT OF POINTS

POINT 1.

THE COURT WAS NOT IN ERROR IN ITS FINDINGS AS TO THE SOLVENCY OF FRANK LAMBETH ON MAY 18, 1953, AND IN FINDING THAT THE TRANSFER OF THE REAL AND PERSONAL PROPERTY, WHETHER AT THAT TIME OR UPON MANUAL DELIVERY IN THE SUMMER OF 1952, WAS NOT IN FRAUD OF CREDITORS.

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(b) THERE IS A WEALTH OF EVIDENCE OF CONSIDERATION FOR THE TRANSFER OF THE REAL ESTATE AND SHEEP OPERATION REPRESENTED BY EXHIBITS 7, 8, 9 AND 10.

(c) THE TRANSFER BEING PRIOR TO THE TIME THE GIVANS BECAME CREDITORS OF LAMBETH, A SHOWING OF ACTUAL INTENT TO DEFRAUD IS NECESSARY WHETHER THE TRANSFER WAS FOR FAIR CONSIDERATION OR, ON THE OTHER HAND, WAS VOLUNTARY.

(d) THE DELIVERY IN THE SUMMER OF 1952 DOES NOT SHOW AN INTENT ON THE PART OF FRANK LAMBETH TO DIVEST HIMSELF OF HIS PROPERTY IMMEDIATELY BEFORE ENTERING INTO A SUBSTANTIAL

BUSINESS IN WHICH HE CONTEMPLATED CONTRACTING DEBTS BEYOND HIS ABILITY TO PAY.

(e) BADGES OF FRAUD.

(f and g) THE EVIDENCE DOES NOT SUPPORT THE PLAINTIFF'S CONTENTION THAT FRANK LAMBETH RETAINED THE LAND OR GOODS IN HIS POSSESSION OR UNDER HIS CONTROL.

(h) THE EVIDENCE DOES NOT ESTABLISH THE CREATION OF A TRUST FOR FRANK LAMBETH.

POINTS 2. and 3.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN PARAGRAPHS 6 AND 7 OF THE JUDGMENT.

POINTS 4, 5, and 6.

THE COURT DID NOT ERR IN SUSTAINING DEFENDANTS' OBJECTION TO PROFFERED EXHIBITS 13, 14, 15, AND THE DEPOSITION OF THE WITNESS SCOVILLE.

POINT 7.

THERE IS NO ERROR IN THE COURT'S FAILURE TO ADMIT FOR THE CONSIDERATION OF THE JURY EVIDENCE CONSISTING OF THE LAMBETHS' CHECKING ACCOUNT FROM JUNE 1952 TO AND INCLUDING AUGUST 1953.

POINT 8.

THE COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR A DIRECTED VERDICT.

ARGUMENT

POINT 1.

THE COURT WAS NOT IN ERROR IN ITS FINDINGS AS TO THE SOLVENCY OF FRANK LAMBETH ON MAY 18, 1953, AND IN FINDING THAT THE TRANSFER OF THE REAL AND PERSONAL PROPERTY, WHETHER AT THAT

TIME OR UPON MANUAL DELIVERY IN THE SUMMER OF 1952, WAS NOT IN FRAUD OF CREDITORS.

(a) THE BURDEN OF SHOWING INSOLVENCY IS ON THE PLAINTIFF AND THE EVIDENCE SHOWS LAMBETH TO HAVE BEEN SOLVENT ON AUGUST 1, 1950 WHEN THE DEEDS WERE EXECUTED; IN THE SUMMER OF 1952 WHEN THE DEEDS AND BILL OF SALE WERE DELIVERED; IN MAY, 1953, WHEN THE DOCUMENTS WERE RECORDED, AS SOLVENCY IS DEFINED IN 25-1-2, UTAH CODE ANNOTATED, 1953.

25-1-2 "INSOLVENCY. — A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to satisfy his probable liability on his existing debts as they become absolute and matured.

"In determining whether a partnership is insolvent there shall be added to the partnership property the present fair salable value of the separate assets of each general partner in excess of the amount probably sufficient to meet the claims of his separate creditors, and also the amount of any unpaid subscription to the partnership of each limited partner; provided, the present fair salable value of the assets of such limited partner is probably sufficient to pay his debts, including such unpaid subscription."

Frank Lambeth and Norman Esmeier entered into a joint enterprise for the purchase of all but 20 shares of Givans, Inc. stock by an agreement dated January 6, 1953 (R. 20-22) and an addendum to that agreement dated February 18, 1953 (R. 23) for the purchase price of \$50,400.00 (T. 3), of which \$16,000.00 was paid in cash by Lambeth and the balance to be paid by four notes as

set forth in the plaintiff's complaint. The sellers expressly retained full recourse to the stock to secure the notes, a statement regarding recourse being found in the addendum (R. 23). The assets of the corporation were found by the court to be in excess of \$100,000.00 (Finding 7, R. 58). This finding, prepared by the plaintiff, was based on the testimony of the plaintiff Edwin Givan and his brother Bertrand Givan, who had been up to that time president and vice president, respectively, of Givans, Inc.

Edwin, testifying as to the value of the assets of the corporation in February, 1953, testified to a minimum value of \$143,000.00, including value of the building and grounds at \$90,000.00 to \$95,000.00 (T. 137-139). The minimum figure from Bertrand's testimony (T. 107-109) was \$131,000.00, including \$90,000.00 to \$95,000.00 for the building and grounds and not including the notes or accounts receivable. The liabilities of the corporation were set forth in the sale agreement between the parties to this lawsuit as \$57,850.00.

The interests of both Esmeier and Lambeth in the stock of the corporation is jointly attributable to the payment of the \$34,500.00 worth of notes due to the Givans for determining the question of solvency of either, under the second paragraph of 25-1-2, UCA, 1953, *supra*.

There is no showing of a substantial fluctuation in the value of the assets of Givans, Inc. between February 18, and May 18, 1953, when the deeds and bill of sale in controversy were recorded. There is not a scintilla of

evidence regarding the diminution value of the ground and building valued by plaintiff's own testimony at \$90,000.00 to \$95,000.00. The same fixtures and equipment were there with only three months' depreciation and the only evidence regarding the parts inventory is Frank Lambeth's statement on examination by plaintiff's counsel that the assets were greater on May 18, 1953 than on February 18, 1953 (T. 239-242).

Plaintiff makes much of the court's refusal to admit pleadings and files foreign to this suit and evidence of the L. C. Miles mortgage in July of 1953 and the Farmers State Bank judgment on September 25, 1953, even in view of the fact that these were obligations against the corporation at the time of the stock transaction between the parties to this suit.

The plaintiff ignores the fact that under 25-1-2, UCA 1953, Esmeier's interest in the corporation was equally attributable to payment of the notes sued on as was Lambeth's and the entire interest purchased by the agreements of January 6, and February 18, 1953, is subject to the notes, which makes the plaintiff a creditor and the entire interest is to be computed in determining Lambeth's solvency, rather than a one-half interest, as indicated by the plaintiff's brief at page 26. The plaintiff, on the question of solvency, also fails to consider that the deeds and bill of sale were executed on August 1, 1950 (R. 87) and delivered in the summer of 1952 (R. 87).

In the final analysis at the time of recording the deeds in May, 1953, defendants Esmeier and Lambeth

held a 1980/2000 interest in assets rated by the plaintiff and by Bertrand Givan, plaintiff's witness and initial payee on two of the notes sued on, as having a value in excess of \$130,000.00, against which there were liabilities in the sum of \$57,850.00 as set forth by the agreement between the parties, which leaves after the deduction of the \$16,000.00 cash payment acknowledged by the agreement a minimum of \$72,150.00 worth of assets to secure \$34,500 worth of notes for which the plaintiff held recourse to the 1980 shares of stock.

Plaintiff contends that the question of the defendant Lambeth's solvency on December 5, 1953 should be controlling and that the court erred in making no finding thereon (plaintiff's brief 23). All the sections of Utah's Fraudulent Conveyance Act so frequently cited by the plaintiff contemplate solvency as defined by 25-1-2, UCA 1953, and relate to the financial condition of the transferor at the time of the alleged fraudulent conveyance or conveyances. The latest date that the court could find that the transfers in issue took place was the recording date of May 18, 1953, and Lambeth's assets at that time consisted of a joint interest with Esmeier of virtually all the stock in a corporation that by the plaintiff's own testimony had assets worth in excess of \$143,000.00 (R. 137-139) a short three months before and which had obligations of \$57,850.00. There is no evidence to show a diminution in the value as of May 18, 1953 at any place in the record.

Lambeth could no more contemplate that the present fair salable value of his assets was less than the amount

required to pay his existing liabilities as they became absolute and final (see 25-1-2, UCA 1953) on May 18, 1953 than he could when he paid the plaintiff and his brother \$16,000.00 on February 18th of the same year, only ninety days before. There is *no evidence* that the *fair salable value* of the assets was less in May 1953 than in February 1953 and the only evidence of the value in February is that of the plaintiff and the plaintiff's brother Bertrand, both of whom were parties to the sale of stock and each a payee of the notes upon which this suit was originally instituted.

(b) THERE IS A WEALTH OF EVIDENCE OF CONSIDERATION FOR THE TRANSFER OF THE REAL ESTATE AND SHEEP OPERATION REPRESENTED BY EXHIBITS 7, 8, 9 AND 10.

In its Findings of Fact, the trial court found that

(a) Lambeth was not insolvent at the time of the conveyance of the property, both real and chattel by deeds Exhibits 7, 8, and 9, and bill of sale Exhibit 10 (Findings 15, 16, 17, and 18, R. 90-91). (b) There was consideration for the transfer (R. 88). (c) He was not indebted except for debts secured by mortgages on the transferred property at either the time of execution of the documents or at the time of delivery of the documents (Findings 6 and 7, R. 88).

Our Fraudulent Conveyance Act, Title 25, Chapter 1, UCA 1953, makes a voluntary conveyance fraudulent only when:

1. It makes the transferor insolvent as set forth in 25-1-2, UCA 1953.

2. When the transferor is about to engage in a business with an unreasonably small capital.

3. When he *intends to or believes that he will* incur debts beyond his ability to pay (25-1-6, UCA 1953).

4. To hinder, delay, or defraud creditors (25-1-7, UCA 1953) with claims either matured or not matured.

If the transfer is not voluntary but is for a fair consideration (25-1-3) the transfer is not fraudulent, even though misfortune or bad business judgment makes the transferor insolvent shortly thereafter unless there is an express showing that the transfer was a mere device to create a trust for the transferor with the intent to defraud future creditors.

In the present suit the plaintiff in order to prevail must establish that the transfer of the real and personal property conveyed to the sons by Frank Lambeth rendered him insolvent at the time of the transfer, whether that be on delivery of the deeds and bill of sale in the summer of 1952 or on the date of recordation, May 18, 1953. In addition to such insolvency, the plaintiff must overcome the trial court's finding of fair consideration. Overcoming one finding without overcoming the other is insufficient in the absence of a showing of actual fraudulent intent and the evidence supporting each finding serves to negative any such intent.

In discussing the consideration for the transfers, the

whole of the evidence shows that the father was not only indebted to the four sons for years of work during their majority for which they were never fully paid, but goes above and beyond a fair consideration to the point that it is apparent without the labor of the sons the chattel property and the grazing land would have never been accumulated (see Lambeth's testimony, T. 192).

Q. In 1950, what would you say was the fair market value?

A. Excuse me, Keith, what year did we get the Dr. McCormick place?

The boys worked with the father in acquiring the sheep, camp equipment, and land, and at least two of the boys, Thallo and Keith, had passed their majority at the inception of the business in 1934.

The bill of sale itself, Exhibit 10, sets forth the consideration of \$1.00 "and in consideration of the continual labor and help they have given without pay."

It is apparent from the instruments themselves that the property was transferred and received for the consideration of work and labor done. Had the transfers been in the nature of a testamentary disposition or a gift as maintained by the plaintiff, Lambeth's three daughters would have undoubtedly shared equally with their brothers rather than being granted a one-seventh undivided interest in a piece of property valued at \$600.00 to \$700.00, with no interest whatsoever in the range land, house, or sheep operation.

Before a determination as to fair consideration for the sheep operation and the land may be made, there must be a basis for determining the value of the land and chattels. The only guide to such value is in the testimony of Frank Lambeth at T. 193 et seq. With regard to the value in 1950, Lambeth testified that the range land was probably worth \$15.00 an acre. The deeds show approximately 1,000 acres or \$15,000.00, the sheep value \$24,000.00 for the 1600 head (T. 193), horses and equipment \$2,500.00 (T. 194), thus making a total of \$41,500.00.

He testified that the value would be lower in 1953 (T. 194). There was on the sheep, equipment and range land a mortgage to the Bank of Southern Utah in the sum of \$31,000.00 (T. 195). In addition to the sheep and range land, there was the home in Cedar City valued variously at \$14,000.00 (T. 192) and \$18,000.00 (T. 193) and three and one-half acres of farm ground in Iron County valued at \$200.00 per acre or \$600.00 to \$700.00 for the entire piece (T. 192). After deducting the \$31,000.00 note and mortgage to the Bank of Southern Utah, there would be left a maximum value of about \$25,000.00 deeded to the four boys, not taking into consideration the one-seventh interest each, held by the three girls in the farm ground.

There is no other basis of valuation of the property in the evidence produced at the trial.

As to the consideration that the boys had worked on the sheep operation without drawing regular wages since

the year 1934, we agree with the plaintiff's statement that a parent is entitled to the labors of his minor children without consideration. However, the evidence shows at the time of trial that Thallo Lambeth was 49 years old, Keith 47, Ellis 43, and Aubra 37 (T. 181). Therefore, Lambeth had not been entitled to Thallo's labor since 1930, Keith's since 1932, Ellis' since 1937, and Aubra's since 1942. Up to 1950, when the deeds were executed, the labor and assistance in the business for which the boys were not ever fully paid consisted of 16 years for Thallo and Keith, 13 years for Ellis, and 8 years for Aubra that were not a matter of right in Frank Lambeth under the law. Of course, at the time the deeds were delivered in 1952, there would be an additional 2 years for each of the four boys.

Frank Lambeth testified as to the work of the boys since 1934. Keith, Ellis, and Aubra testified as to their work and the basis of their pay and all four testified as to the services of Thallo, who was with the sheep at the time of trial (T. 401-502). The court found after consideration of all the testimony, together with the documents entered as set forth in Finding No. 8 (R. 88):

“That Frank Lambeth's sons had rendered services in assisting him in operating said sheep and grazing land during a period of more than twenty years prior to 1952 and had not drawn full wages for such services, but had worked with the expectancy of receiving an interest in the property when Frank Lambeth had retired or died. That evidence does not show even approximately the amount earned or the amount received by said

sons from said sheep operation, but it appears that each of them, and particularly Keith, had earned much more than they received from the sheep operation."

This finding is fully supported by the evidence and is sufficient to support a basis of fair consideration.

(c) THE TRANSFER BEING PRIOR TO THE TIME THE GIVANS BECAME CREDITORS OF LAMBETH, A SHOWING OF ACTUAL INTENT TO DEFRAUD IS NECESSARY WHETHER THE TRANSFER WAS FOR FAIR CONSIDERATION OR, ON THE OTHER HAND, WAS VOLUNTARY.

The only evidence with regard to manual delivery of the deeds shows the deeds were delivered unconditionally by Frank Lambeth to Keith Lambeth during the summer of 1952. Keith places the date of delivery as July, 1952. The court, in its findings (R. 88) following the special interrogatories of the advisory jury, finds the delivery to be in August or September. There is no evidence whatsoever refuting this manual delivery.

There is, further, no evidence to show that Frank Lambeth was insolvent at the time of this transfer nor that he contemplated becoming a creditor of the Givans. Title 25, Chapter I, UCA 1953, makes it apparent that a voluntary transfer is effective and not fraudulent if it does not make the grantor insolvent or is not to defraud matured or unmatured creditors nor is a device contemplated to hinder or delay such creditors. Lambeth did not become a creditor of the Givans until February 18, 1953, and at that time by the Givan brothers' own statement as to the value of the assets of Givans, Inc., became

the holder of sufficient assets at their then salable value to meet his existing obligations as they became due and payable. What can be better evidence of the value of assets than the statement of the adverse party or parties to a lawsuit regarding the sale of those assets? It must be concluded that under the circumstances, as shown by all the evidence in this case, there must be a showing of actual intent to defraud at the time of conveyance to hold these conveyances to be fraudulent even were this court to reverse the lower court on its finding that the transfers were for consideration and not voluntary. True, in the Ogden State Bank case, 12 Utah 13, 40 Pac. 765, the court's decision arose from evidence that a voluntary conveyance rendered the defendant insolvent and went on a doctrine of constructive fraud as to *existing creditors*. In the present case, the court found Frank Lambeth to be solvent at all times material to the question of transfer of the property and also found the transfers to be for consideration rather than voluntary. Plaintiff also relies upon the case of *Gustin v. Mathews*, 25 Utah 168, 70 Pac. 402. It is interesting to note that the case was a husband-wife situation, and this court does not and has never considered the parent-child relationship in the same nature as that of the husband and wife relationship. With reference to the above statement, we quote from Judge Wolfe's dissenting opinion in *Lund v Howell*, 92 Utah 232, 67 P. (2d) 215, at page 219 of the Pacific citation:

“A husband and wife embark on the voyage of life together, expecting to meet the waves to-

gether, devoting to the support of themselves and children, and to his success, their common efforts and their several means. She is always willing, from affection for her husband and interest in his success, to extend him the help of her means, his business interests being in a large sense her interests, she never expecting any return of the means she commits to his hands; and if, after he has had those means employed in his business for years, mingled indiscriminately with his, it were permitted her, when misfortune overtakes him, to raise up loans to the prejudice of his creditors, and support them by his own and her evidence, after creditors had trusted him in total ignorance of such loans, and allow him to use his means in purchasing real estate in her name, a wide road would be laid out for the promotion of wrong against honest creditors."

Judge Wolfe, later in his opinion, refers to such conduct as the wife refuge racket, and plaintiff's counsel would attempt to name the conveyance here being litigated as a parent-child refuge racket. However, this is not the case, the law being explicit here and elsewhere that a child working for his parent is entitled to the fruits of his labor after attaining his majority.

(d) THE DELIVERY IN THE SUMMER OF 1952 DOES NOT SHOW AN INTENT ON THE PART OF FRANK LAMBETH TO DIVEST HIMSELF OF HIS PROPERTY IMMEDIATELY BEFORE ENTERING INTO A SUBSTANTIAL BUSINESS IN WHICH HE CONTEMPLATED CONTRACTING DEBTS BEYOND HIS ABILITY TO PAY.

The trial court found delivery of the deeds and bill of sale in question by a manual transfer of possession from Frank Lambeth to Keith Lambeth, one of the grant-

ors in the instruments. The nature of the delivery itself is significant. The testimony shows that the deeds had been in the possession of Frank Lambeth in the same house where Keith was living and where Keith had access to the deeds. However, this was not sufficient in the mind of Frank Lambeth and the evidence shows that he handed the deeds to Keith to be kept at such place as Keith desired to keep them and entirely out of the control of Frank Lambeth, and the act of the grantor in giving of the deeds and the grantees in the acceptance of the deeds by Keith Lambeth excluding the control and possession of Frank Lambeth is adequate evidence as to the intent of the parties. This court set forth in *Stanley v. Stanley*, 97 Utah 520, 94 P (2d) 465, the following language at headnote 5:

“‘Delivery’ of a deed is essentially a matter of intent which intent is to be arrived at from all facts and surrounding circumstances.”

The lower court found that a delivery had been made. This court also in the Stanley case, at page 466 of the Pacific citation, quoting *Olivero v. Eleganti*, 61 Utah 475, 214 Pac. 313, 315, and cases cited thereunder, as follows:

“The scope of the review on appeal in equity cases is clearly settled in this jurisdiction. ‘This court is authorized by the state Constitution to review the findings of the trial courts in equity cases, but the findings of the trial courts on conflicting evidence will not be set aside unless it manifestly appears that the court has misapplied proven facts or made findings clearly against the weight of the evidence.’ ”

The plaintiff attempts to tie in the contract between Esmeier, Lambeth and the Givans dated in October, 1952, as purporting to show that Lambeth made the transfer in the belief that he would incur debts beyond his ability to pay as they matured, as provided by Section 25-1-6, UCA 1953, and further, that Lambeth finally did in February, 1953, enter into a business transaction which on its face appears to be for the purchase of stock from the Givan brothers, with the payment of \$16,000.00 on a \$50,400.00 obligation, plaintiff contending this is an unreasonably small capital. However, the evidence as a whole would indicate that the \$16,000.00 paid is roughly 33 $\frac{1}{3}$ % of the purchase price of the stock purchased, and was not business capital for the operation of Givans, Inc., but was paid to the Givan brothers for the purchase of stock. It is also important to note that the Givan brothers secured their notes for the other \$34,500.00 on the stock purchased not by a mortgage of real property or a chattel mortgage of chattel property, but expressly by holding recourse to the stock purchased.

(e) BADGES OF FRAUD.

As the plaintiff points out in his citation from 37 C.J.S., page 922, the so-called "badges of fraud" amount to little more than suspicious circumstances. It would seem that there is not a suit alleging a fraudulent conveyance in this or any other jurisdiction in which some of the so-called badges of fraud are not contended by the plaintiffs. However, the crux of a fraudulent conveyance suit must depend upon a combination of insolvency of the transferor caused by a transfer of property, and

lack of a fair consideration for such transfer. In the event of fair consideration or a failure to prove insolvency, there can be no fraud against creditors, and such so-called badges of fraud as may arise create an inference that is readily overcome by the evidence of fair consideration and solvency.

True, there are certain inconsistencies pointed out by the plaintiff in the testimony of Frank Lambeth but, read as a whole, the testimony is straightforward and not inherently improbable. Such inconsistencies arise at any time when a seventy-five year old man is kept on the stand by a clever attorney through approximately half of 518 pages of transcript, especially when all the incidents testified to are at least four years in the past and many of them going back eight, ten, and fifteen years, and as the Oregon Supreme Court stated in its discussion of the badges of fraud in the *American Surety Company of New York vs. Hattrem*, 3 P.(2d) 1109:

“The learned trial judge, who heard the witnesses and saw their demeanor upon the stand, was in a better position to judge of the strenuous effort made, if any, to color the testimony, and was in a better position to pass upon the good faith of Mrs. Hattrem than is this court.”

(f and g) THE EVIDENCE DOES NOT SUPPORT THE PLAINTIFF'S CONTENTION THAT FRANK LAMBETH RETAINED THE LAND OR GOODS IN HIS POSSESSION OR UNDER HIS CONTROL.

All the evidence by all parties indicates that Frank Lambeth did very little work regarding the sheep outfit

after 1947, and that subsequent to 1950, he did practically no work. Even the testimony of the plaintiff and his brother indicates that during the period when the Givans, Inc. garage was on the South Main Street property close to the Lambeth home, which is one of the pieces of property in controversy, that the Givan boys saw Frank Lambeth almost daily, see the testimony of Edwin Givan (T. 386-387).

Q. With reference to your knowledge of Mr. Lambeth's business, you were aware of where Mr. Lambeth lived, were you not?

A. I was.

Q. That was very close to your place of business?

A. Yes.

Q. Did you see Mr. Lambeth frequently?

A. Very frequently, yes.

Q. Almost every day when you were in town?

A. That is correct.

This serves to show that Mr. Lambeth was not in possession of sheep or sheep equipment, but was living in town, which was known to the Givans and was seeing the Givans almost every day. Lambeth's testimony was to the effect that he had not been on the Kane County property for some time and had not done work thereon for years. The possession of the home by Lambeth was not exclusive, the Givan boys being aware as was the rest of the community, that Keith was living there with his wife and family and Thallo lived there when not with the herd.

The jury, in its advisory capacity, after listening to all the evidence found in the special interrogatories with respect to the deeds evidenced by Exhibits 7, three and one-half acres of farm land (R. 81, paragraphs h and i). Exhibit 8, the Kane County grazing land (R. 82, paragraphs h, i, and j), and the bill of sale, Exhibit 10 (R. 84, paragraphs h and i) that Frank Lambeth in August, 1952, delivered possession with the intention of passing title and ownership at that time and without any retention of rights in the control, use, or benefit of the property. The jury found with respect to Exhibit 9, the deed for the house and lot in Cedar City (R. 83, paragraph h and i) that Frank Lambeth in 1952 transferred that property with the intention of passing title and ownership, with the understanding that he had a right to reside there (R. 83, paragraphs h and i).

The trial court, after hearing the same evidence heard by the jury, and having considered certain other evidence relating to the solvency of Lambeth which was withheld from the jury and having been advised by the jury's answers to the interrogatories, made findings consistent with those interrogatories, though not in any way bound to do so. It is also noteworthy that each of the interrogatories answered by the jury was a unanimous finding (R. 81, 82, 83, and 84), indicating that all persons involved, to wit, the judge and the eight jurors who heard the evidence and examined the exhibits and were in the best position to determine the credibility of the witnesses, made the same findings with respect to the questions of delivery, retention of possession, and intent to defraud.

Considering that these nine persons were able to see and hear the witnesses and were consistent in their findings showing an absence of fraud, great weight should be given thereto by the reviewing court. That the appellate court may review the evidence as well as the law in an equity proceeding is conceded, but the cases are legion holding that the appellate court must affirm unless the findings of the trial court are clearly erroneous, see *Olivero v. Eleganti*, supra, also *Hall v. Hall*, 7 Utah 2d 413, where as late as June, 1958, this court held:

“In an equity case the Supreme Court must affirm unless the trial court’s conclusion is obviously against the evidence.”

The plaintiff cites *Clark v. Porter*, 68 P. (2d) 844, an Oklahoma case, as authority for his view on possession. It should be noted that that case is based on a statute requiring a change of possession and not a change of ownership, and is not applicable here. The plaintiff further cites *Anderson v. Courtney*, 218 P. (2d) 261, another Oklahoma case involving the validity of a transfer of personal property between a first transferee and a subsequent purchaser of the same property, and involves the question of necessity of possession as related to subsequent purchasers and not to the rights of creditors.

(h) THE EVIDENCE DOES NOT ESTABLISH THE CREATION OF A TRUST FOR FRANK LAMBETH.

The cases cited by the plaintiff under this point, two California cases and a Kansas case, correctly state the law with regard to situations where there is an attempt

to pass nominal title to property in an obvious attempt to defeat the demands of creditors. The evidence herein discussed by both plaintiff's and defendants' briefs in Points 1 and 2 clearly indicates that the property herein involved was transferred for a valuable consideration and during a period while the transferor was solvent, and therefore, does not create a trust in fraud of creditors.

POINTS 2. and 3.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN PARAGRAPHS 6 AND 7 OF THE JUDGMENT.

The trial court entered its findings, conclusions and judgment after consideration of all the evidence, both testamentary and documentary.

The 518 pages of transcript hold a wealth of evidence to sustain the findings and the findings are sufficient to support the judgment. In addition to the testamentary evidence, the deeds themselves, and particularly the bill of sale of the sheep and equipment, together with the testimony as to date of delivery and the years of work and labor without pay amply support the findings and conclusions and paragraphs 6 and 7 of the judgment of the trial court.

POINTS 4, 5, and 6.

THE COURT DID NOT ERR IN SUSTAINING DEFENDANTS' OBJECTION TO PROFFERED EXHIBITS 13, 14, 15, AND THE DEPOSITION OF THE WITNESS SCOVILLE.

Plaintiff contends that the court erred in refusing to admit certain evidence proffered as Exhibits 13, 14, and

15, and deposition of one Scoville, as agent of the Pacific Finance Company.

Exhibit 13 is a note and mortgage to Pacific Finance Company by Givans, Inc., dated May 14, 1953 which states on its face that it was for "value received." The court sustained defendants' objection to the exhibit on the ground that the mortgage was given to secure a note for consideration obtained at that time and would make no difference in the assets of Frank Lambeth. Plaintiff contends that the mortgage was given to secure an indebtedness incurred by financing cars sold by Esmeier (plaintiff's brief 65). There is no evidence to support this statement by the plaintiff and the exhibit was properly rejected.

Exhibit 14 is a mortgage given by Givans, Inc. to one L. C. Miles on July 1, 1953 and is on its face and by plaintiff's admission a renewal of the \$5,000.00 obligation to Miles that is set forth in the original stock purchase agreement between the parties on January 6, 1953. It is, therefore, of no probative value with regard to a change of financial condition of Givans, Inc. between February 18, 1953 and May 18, 1953.

Exhibit 15 consists of certain pleadings, stipulations and related papers in a suit in which none of the parties to the present suit were parties. The court's sustaining the objection to the admission of Exhibits 15 a through h was entirely proper (T. 224).

The deposition of Richard B. Scoville was partially read into the record (T. 373-376), whereupon the court sustained an objection so far as allowing the reading of

the deposition before the jury, but received the deposition for consideration of the court (T. 377). Again, at the risk of repetition, we must point out that the final determination of this matter was for the court and not the jury, and that the court must be presumed to have fully considered such deposition.

POINT 7.

THERE IS NO ERROR IN THE COURT'S FAILURE TO ADMIT FOR THE CONSIDERATION OF THE JURY EVIDENCE CONSISTING OF THE LAMBETHS' CHECKING ACCOUNT FROM JUNE 1952 TO AND INCLUDING AUGUST 1953.

This case being a matter in equity, the jury sat only in an advisory capacity and the court was not bound by the findings of the jury. The parties stipulated that the checks could be considered for all issues to be determined by the court (R. 463-464).

The case being equitable, all issues were for the determination of the court, the court being at liberty to accept or deny any or all advisory interrogatories answered by the jury.

POINT 8.

THE COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR A DIRECTED VERDICT.

The case being equitable and for the determination of the court, and the jury's findings being advisory in nature only and not in any way binding on the court, the court's denial of the motion for directed verdict by the plaintiff as well as the motion for directed verdict by the

defendants was immaterial and consisted of nothing more than the court's taking the case under advisement.

GENERAL DISCUSSION REGARDING THE LAW

The plaintiff, in his discussion regarding all points beginning on page 67 of plaintiff's brief, cites certain cases and comments thereon, and we feel it necessary to distinguish and differentiate certain of those cases and to set forth further authority.

The case of *Randall v. Tracy-Collins Trust Co.*, 6 Utah 2d 18, 305 P (2d) 480, is a suit for specific performance of an oral contract. This court affirmed on the basis that the evidence was not so vague and uncertain that the finding of the trial court was erroneous.

Both *Adams v. Silver Shield Mining and Milling Company* and *Gustin v. Mathews*, cited by the plaintiff, were cases where the transfers were voluntary and the transfers also made the transferor insolvent. *Zuniga v. Evans*, 87 Utah 198, 48 P. (2d) 513, involved a transfer from the father to daughters while an action for damages was pending, the deeds were not recorded until eight days prior to filing of the judgment in that action. In that case, the trial court found the transfer to be fraudulent due to lack of a fair consideration and due to insolvency of the defendant caused by the transfer. The appellate court held consistent with former holdings of the Supreme Court that the trial court was to be upheld unless the weight of the evidence was against the trial court's finding. The Supreme Court affirmed the trial court's finding.

In the plaintiff's citation of *American Surety Company of New York v. Hattrem*, supra, plaintiff makes his own paraphrasing (see page 72 of plaintiff's brief) of a purported simile arising between a conveyance from husband to wife and, on the other hand, a conveyance from parent to children. This comparison is not warranted by the law.

The American Surety case is also interesting with regard to the discussion of "badges of fraud," and that court states at page 1111 of the Pacific citation:

"The learned trial judge, who heard the witnesses and saw their demeanor upon the stand, was in a better position to judge of the strenuous effort made, if any, to color the testimony, and was in a better position to pass upon the good faith of Mrs. Hattrem than is this court."

Again the appellate court affirmed the trial court.

Similarly, the trial judge in the present case was in a better position to pass on the good faith of the defendants in this action, both the transferor and the transferees. Also, he was supported by the unanimous advisory answers to interrogatories by a jury which also heard the testimony and was able to observe the demeanor of the witnesses upon the stand, and such answers are consistent with the findings of the trial court.

In *Ogden State Bank v. Barker*, supra, again the Supreme Court affirmed the judgment of the trial court. In *Stanley v. Stanley*, supra, cited by plaintiff at page 46, the trial court found from the facts before it that

there had been no delivery of a deed in evidence between a husband and wife, there being a wealth of evidence that the grantor had remained in possession and control of the premises deeded for a period of twenty-one years after execution of the deed. This court affirmed the findings of the trial court under the long-established rule that in equity cases the reviewing court should not overturn the judgment of the trial court unless the trial court's findings are *clearly erroneous*.

Smith v. Edwards, 81 Utah 244, 17 P. (2d) 264, cited by plaintiff at 1270, is one of the few cases found by either plaintiff or defendant where the Supreme Court reversed the trial court, and in that case found the error to be in the trial court's findings from the evidence that the conveyances were fraudulent. The Supreme Court reversed and remanded with directions to dismiss the action.

Paxton v. Paxton, 80 Utah 540, 15 P (2d) 1051, cited by the plaintiff at page 80, again affirms the general rule that the trial court's findings should not be disturbed unless clearly wrong. In that case, the Supreme Court reversed in part and affirmed in part, that case being a question of mortgage foreclosure rather than a direct conveyance.

In *Webster v. Peterson*, 46 P. (2d) 676, the trial court found a mortgage given by a husband to a wife covering his undivided one-half joint interest in a farm to be in fraud of creditors, the trial court having found that the note and mortgage were given to defraud the plain-

tiff and prevent him from collecting the amount due on his judgment. The defense was that the mortgage was for a valuable consideration and not fraudulent. In a discussion of headnote 5 thereof, the Supreme Court holds that the recitation of valuable consideration on a note is written evidence of a debt then created and thereafter existing and owing. This case is important both due to the Supreme Court's reversal of the trial court in finding the mortgage not to be fraudulent in spite of the husband and wife relationship, but also with regard to the plaintiff's points 4, 5, and 6 regarding a similar note and mortgage from Pacific Finance to Givans, Inc. also reciting on its face a valuable consideration.

Referring again to the *Stanley v. Stanley* case, cited supra, Judge Wolfe in his concurring opinion cites a great number of cases, including the majority of cases cited by both plaintiff and defendant in this action, many of those cases referring directly to fraudulent conveyance actions and all regarding the findings and opinions of the trial judge when considered by an appellate court in an appeal from an equitable action. Justice Wolfe in that concurring opinion collects many of the cases by this court and all those cases indicate that the opinion of the trial judge must be considered to the point that even though there be a preponderance of evidence against the trial court's conclusions, the appellate court should affirm.

The appellant and plaintiff points out at pages 20 and 21 of his brief, citing from 37 C.J.S., Section I, page

852, that "creditors are a favored class and preservation of their rights is a fundamental policy in law."

Purchasers for value are also to be protected by the law, and a conveyance is not to be found fraudulent as to creditors and therefore invalid unless there is both a voluntary conveyance and a conveyance creating or tending to create willful insolvency. In this case there is neither.

CONCLUSION

From a voluminous record, including four days of trial with regard to the fraudulent conveyance part of this suit following two days of trial on the portion of the suit as to the validity of the notes, and after taking the matter under advisement to review the documentary evidence submitted, being fully cognizant of the advisory interrogatories answered by the jury, the learned trial court found that the three deeds and the bill of sale alleged to be fraudulent were valid, were delivered for a valuable consideration, and were delivered and recorded while Frank Lambeth, the transferor, was solvent. The court had ample opportunity through several days of trial to observe the demeanor and determine the credibility of the transferor and three of the principal transferees. In fact, the transferor Lambeth was on the stand for the greatest part of two days in the last portion of the hearing. The trial court had ample opportunity to determine his good faith in the transaction and lack of intent to defraud. The testimony of all the defendants testifying, when considered as a whole, is consistent and

impressive. Plaintiff argues that Lambeth and Esmeier, with reference to the assets of Givans, Inc., “reaped all the benefits from the disposition of the assets until Lundgren foreclosed his mortgage.” There is no evidence as to the disposition of the assets and the evidence affirmatively shows that Lambeth, the transferor, never took anything from the corporation. Plaintiff characterizes the transfers of property from the father, Frank Lambeth, to the sons as a father-children racket when there is no evidence to show either lack of consideration for the transfers or the insolvency of the transferor at the time of the transfers, or an intent upon the part of the transferor or transferees to defraud the plaintiff or the other persons on the notes given by Esmeier and Lambeth to the plaintiff, his brother Bertrand, and their wives. The cases cited both by the plaintiff in his able brief and by the defendant are consistent in holding that though the Supreme Court may review the evidence as well as the law in a proceeding of this nature, the opinion and findings of the trial judge, due to his more advantageous position in being able to view the demeanor and candor of the witnesses on the stand, must carry great weight, and that the Supreme Court must affirm unless it appears that the findings of the trial court were obviously in error. The voluminous record in this trial has been well stripped by the plaintiff in his lengthy brief in excerpting portions of testimony from the 518 pages of transcript of testimony, the large sheaf of exhibits, and the numerous pleadings, but the evidence considered as a whole is fully sufficient to support all find-

ings and conclusions of the trial court and to support the trial court's decision in refusing the admission of certain exhibits proffered by the plaintiff. The trial court had for its consideration answers to interrogatories by a jury sitting for the purpose of advising the trial court as to certain findings of fact, and the eight jurors were unanimous in their findings, which findings are consistent with the views of the trial court.

Therefore, it is insisted that the findings, conclusions and decree were correct and in fact were the only equitable determination of the issues in this proceeding, and should be affirmed.

Respectfully submitted,

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